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No. 90-1694

In The

Supreme Court of the United States

October Term, 1990

EDWARD LINGERFELT,

Petitioner,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Commercial Insurance Company of Newark, N.J., submits this Brief in support of its request that this Court deny the Petition for Writ Certiorari seeking review of the opinion of the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

The petitioner's Statement of the Case omits key facts and avoids the legal grounds upon which the Magistrate and the Sixth Circuit Court of Appeals based their respective decisions against him. Neither the trial court nor the appellate court opinions turn on the issue of the definition of an "accident" as urged by petitioner Lingerfelt. To the contrary, the petitioner was denied accidental disability benefits under the Voluntary Accident Insurance Plan for Hourly Employees of Nuclear Fuel Services, Inc., because the undisputed facts showed that he had a history of serious, active, and disabling degenerative disc disease and had already been judicially adjudged to be suffering significant permanent disability for years prior to the back strain incident of October 8, 1987. The accident plan's "illness and disease" exclusionary clause and its specific requirement that the accidental disability result "directly and independently of all other causes" formed the basis for the Magistrate's judgment against the petitioner and basis for the Sixth Circuit's affirmation of the denial of accidental disability benefits. There is no compelling reason for this Court to develop a federal

common law definition of the term "accident" since such a definition was not critical to the disposition of this case.

The Magistrate's Opinion, reproduced in petitioner's Appendix A, contains several pages which detail Lingerfelt's history of prior back injuries and his severe degenerative disc disease which existed prior to the incident which led to his claim for total disability in this case. The records showed, and the Magistrate found, that the plaintiff had complaints of back pain as far back as March, 1973. Lingerfelt missed four to five months of work because of his back pain in 1974 and was hospitalized at Memorial Hospital, Inc, in Johnson City, Tennessee. After four days of conservative treatment, the plaintiff was discharged with a diagnosis of lumbar disc syndrome [A. 6].[1]

In June, 1975, the plaintiff suffered an on-the-job lifting injury at NFS. A state court worker's compensation action resulted in the petitioner's being found to have sustained a 42% permanent partial disability to the body as a whole. His doctors restricted the petitioner from engaging in any type of employment activity which required repeated or strenuous lifting, pushing, or stacking. The petitioner was prohibited from lifting more than 25 pounds and was instructed to alternate positions between sitting and standing. Lingerfelt's physicians diagnosed his 1975 condition as chronic lumbosacral strain and advised him to perform only light work. The

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[1] Cites to the Magistrate's Opinion and to the Sixth Circuit's Opinion are to the pages of the Petitioner's Appendix at which the two unreported decisions are reproduced.

Magistrate noted that these 1975 restrictions were "virtually identical to those imposed on the plaintiff after his injury sustained in October, 1988" [A-8]. The Magistrate also noted that petitioner Lingerfelt had applied for accidental permanent and total disability benefits under a different insurance policy in effect at NFS in 1975 but that his claim had been denied [A-9].

After a few years absence, the petitioner returned to work at NFS in August, 1979. The company ordered restrictions on his activities to lifting no more than 25 pounds and to refrain from repeated stooping, pushing, pulling, or much step climbing. The petitioner gradually exceeded these restrictions as the weeks passed [A-9].

In 1984, Lingerfelt was admitted to Johnson City Medical Center Hospital for ten days and received treatment for his back condition. X-rays revealed marked narrowing of the lumbosacral disc and the petitioner's physician opined that he was suffering from degenerative arthritis [A-9]. More treatment for recurring back pain was necessary in 1986. Orthopaedic surgeons released the petitioner to return to work at that time after CT scans showed that he was suffering from multiple level degenerative disc disease and could not benefit from surgery. The petitioner was advised that he had to be careful with his back for the rest of his life because of multiple level painful degenerative disc disease he suffered [A-10].

The Magistrate's findings regarding Lingerfelt's history of back pain, and serious degenerative disc disease, and his previous court adjudicated permanent partial disability were based on numerous medical records, NFS personnel file records, and state court documents, as well

as on deposition evidence and the petitioner's own trial testimony. The factual findings were not attacked on appeal.

The respondent company did insist during the trial of the case that the petitioner had not suffered an "accident" under the terms of the policy. The respondent pointed out that the concept of an "accidental" injury for purposes of recovery under accidental disability insurance policies had been developed and refined by numerous Tennessee state court decisions. This concept had been acknowledged to be specifically applicable to accident insurance policies by the Sixth Circuit Court of Appeals in *Nicholas v. Mutual Benefit Life Ins. Co.*, 451 F.2d 252 (6th Cir. 1971). Tennessee decisional law has repeatedly required that an insured show that the cause, as well as the result, of an injury be unusual and unexpected in order to recover under an accidental injury or disability policy.[2] While the defendant insists that this state law definition of "accident" is applicable only to accidental injury and disability insurance policies is directed solely at the insurance industry, and should therefore be saved from preemption under ERISA's "savings clause" at *29 U.S.C. § 1144(b)(2)(A)*, the defendant points out that it was not necessary for the trial court or the court of appeals to reach this issue in order to decide the case. Whether the petitioner's back strain which he suffered

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[2] *Mutual Life Ins. Co. of New York v. Distretti*, 159 Tenn. 138, 17 S.W.2d 11 (1928); *Provident Life & Accident Ins. Co. v. Campbell*, 18 Tenn. App. 452, 79 S.W.2d 292 (1934); *Scott v. Metropolitan Life Ins. Co.*, 169 Tenn. 351, 87 S.W.2d 1011 (1935); and *Seeley v. Pilot Fire & Casualty Co.*, 222 Tenn, 33, 432 S.W.2d 58 (1968).

while he was intentionally lowering a heavy motor is an "accident" within the restrictive coverage terms of the NFS accidental injury and disability policy is not critical in this particular case.

The medical evidence produced at trial, which had been relied upon by the defendant in initially denying the petitioner's claim for a $250,000.00 lump sum permanent total disability benefit, showed conclusively that the plaintiff's pre-existing degenerative disc disease was the primary and predominant cause of his present condition. Lingerfelt's treating orthopaedic surgeon, Calvin Johnson, M.D., could not say with certainty that the petitioner would be able to return to work because of his significant pre-exiting degenerative disc disease. The doctor restricted the petitioner from engaging in repetitive lifting, bending, stooping, twisting, climbing ladders or stairs, vigorous or strenuous pushing or pulling, or repeated jostling. At the time of his February, 1988, deposition for use in the petitioner's state court worker's compensation case, Dr. Johnson testified that the plaintiff had a permanent impairment of twenty percent to the body as a whole because of his back condition, at least twelve percent of which could be attributed to his October 8, 1987, injury, and the remaining eight percent of which pre-existed the October, 1987, lifting incident [A-12].

Other physicians confirmed the significance of Lingerfelt's pre-existing degenerative disc disease and its debilitating effect upon the plaintiff [A-13]. Dr. Alex Williams testified by deposition that he would have restricted the petitioner from performing medium to heavy work prior to the October, 1987 injury. Earlier CT

scans and x-rays showed that the plaintiff's degenerative disc disease was the reason why the petitioner's work activities had been restricted in the past and would continue to be restrict in the future [A-13].

The Magistrate's opinion included a reference to the Social Security Administration's findings that the petitioner suffers from degenerative spinal disease at multiple lumbar levels. In addition to social security benefits, the petitioner was receiving long-term disability monthly benefits under a separate illness and injury disability insurance plan provided by NFS [A-15]. The petitioner also accepted a lump sum payment of $20,000 in a state court worker's compensation case against NFS and Liberty Mutual Insurance Company. This settlement represented an award of permanent partial disability to the petitioner's body as a whole of 29.8 percent [A-13].

The Magistrate's conclusion was quoted and confirmed by the Sixth Circuit Court of Appeals in its opinion set out in petitioner's Appendix at page A-33, 34:

> After reviewing the facts of this case and looking at the terms of the subject plan, [I find] that the plaintiff did not suffer a 'loss resulting directly and independently of all other causes,' but instead is unable to return to his former occupation with NFA [sic] as a result of a 'illness or disease' which he has been suffering for over fifteen years and which excludes him, under the terms of the policy, from receiving benefits. The proof shows that the plaintiff's severe and painful degenerative disc disease and arthritis combined and concurred with any injury he may have sustained in October of 1987 to cause his present condition. His own physician stated that

> he is suffering from a severe disc disease which is a significant factor in his present disability.

The Sixth Circuit held that the Magistrate's finding, based upon his careful review of medical records and testimony documenting a fifteen-year history of plaintiff's back problems was not clearly erroneous [A-34].

The Magistrate had analyzed the plaintiff's claim under state law standards and then under ERISA standards. Proximate cause, not the definition of the term "accident", was the critical factor in the trial court's denial of benefits. Similarly, the Sixth Circuit focused on the proximate cause of the petitioner's present physical condition as well as his reasonable expectation of coverage under the limited terms of the accidental injury disability plan. The Court of Appeals assumed, without deciding, that ERISA applied to the NFS accidental injury and disability plan since the parties had stipulated that it did [A-36, n.2]. The Court stated that the issues on appeal were:

> . . . 1) whether the magistrate's fact finding that disease rather than accident caused the employee's back injury is clearly erroneous, and 2) whether, assuming the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001, *et seq.*, applies, ERISA policy dictates that the insurance plan to be construed to cover Lingerfelt's injuries.
>
> Petitioner's Appendix, p. A-29

What does or does not constitute an "accident" was not an issue considered by the Sixth Circuit. Proximate cause and the import of plan's clear contract language were considered to be determinative of the petitioner's claim. After citing applicable appellate decisions from

other circuits, the Court of Appeals concluded that federal common law under ERISA did not require that coverage be extended to injuries caused "substantially or entirely by a known, pre-existing disease" despite the "explicit language" of the plan to the contrary [A-36].

The Court of Appeals recognized that the plaintiff was receiving benefits under a more general long-term disability plan which covered disability resulting from disease as well as from accident and that the accidental injury plan was supplemental and more restricted in its coverage requirements [A-35]. The Court concluded that "the employee's reasonable expectations were not upset" by its ruling that the plan's insuring clause and exclusionary clauses meant exactly what they said and that disability which was caused in whole or in part by the plaintiff's active and pre-existing disc disease was effectively excluded from coverage [A-40].

SUMMARY OF ARGUMENT

An ERISA federal common law definition of an "accident" for purposes of the accidental injury and disability policy at issue in this case was not critical to the disposition of the case in the proceedings below and was not considered by the Sixth Circuit Court of Appeals. The plan's exclusionary clause for injuries and disability resulting from "illness or disease" and the factual finding that the petitioner's known, previously diagnosed, active, and progressive degenerative disc disease was the proximate cause of his present condition were the critical factors in the trial and appellate courts' decisions.

The precedent cited by the petitioner supports the respondent's position and does not create any conflict among circuit courts of appeal as to the issues determinative of the merits of this case.

ARGUMENT

Contrary to the theme expounded throughout the Petition, there is no conflict among the circuit courts of appeal with regard to the reasons for the Sixth Circuit's holding in this case. The respondent company has no quarrel with the holdings of the various circuits which are cited by the petitioner. A review of those decisions and a comparison with the Sixth Circuit opinion below demonstrates that there are no grounds upon which a writ of certiorari should issue in this case.

The Sixth Circuit's opinion turns on the applicability of the policy's explicit exclusion of coverage for injuries or disability resulting from disease. The Court quotes from the First Circuit's opinion in *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486 (1st Cir. 1989) in support of its determination to that the developing federal common law of ERISA requires that the literal language of the contract be followed except where public-policy considerations dictate otherwise [A-37]. The basis for the holding below is set out in the Sixth Circuit's opinion at A-38:

> . . . . A provision in an accident insurance policy providing in effect that the policy does not cover losses resulting from disease rather than from accident is not an "unduly restrictive" provision in our view. If this were a case where the employee's disease were subtle or latent, where

> the employee had not been warned against precisely the outcome that ensued, or where the disease contributed only negligibly to what as essentially an unforeseen calamity, then perhaps the insurance company would not be justified in denying benefits. In such a case, the employee's reasonable expectations might be upset by denying benefits. Here, however, we perceive nothing unconscionable or misleading about the accident policy on its face, and most importantly for us, Lingerfelt's situation fell within the clear language of the policy exclusions.

The appellate cases cited by the petitioner do not conflict with this legal conclusion. In fact, the cited cases support the denial of accidental disability benefits to the petitioner in light of the unchallenged factual record which shows the petitioner suffered significant physical impairment and was under severe physician-imposed work restrictions because of his diagnosed, pre-existing, and active degenerative disc disease.

Wickman v. Northwestern National Insurance Co., 908 F.2d 1077 (1st Cir. 1990), *cert. denied*, 59 U.S.L.W. 3418 (1991), dealt with whether the life insurance contract in dispute was an ERISA plan and what definition of "accident" should be applied under the terms of the policy. After noting that the employer offered a comprehensive insurance program, of which the contested policy was but a part, and noting that the employer distributed a handbook listing ERISA rights and a summary plan description, the First Circuit ruled that the policy had met ERISA's jurisdictional requirements.[3]

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[3] As previously stated, the Magistrate found for the respondent on both ERISA and the alternate state law theories.

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The Court then concluded that the definition of accident was "less than dispositive" and proceeded to analyze the different legal concepts of "accident" which had been developed in previous state court and federal court insurance contract litigation. The "accidental means" and "accidental results" distinctions which exist in a majority of jurisdictions as well as in Tennessee were reviewed and finally rejected in favor of a rather vague, two-pronged "subjective-objective reasonable man expectation" criterion for an "accident." After developing this compromise criterion, the First Circuit affirmed the magistrate's ruling that the insured's death was not accidental within the meaning of the policy. The Court's opinion does not indicate whether the applicability of ERISA's saving clause (*29 U.S.C. § 1144(b)(2)(A)*) to state court decisional law defining the term "accident" in accidental death and dismemberment insurance policies was raised by either party at any stage in the proceedings. There certainly was no discussion of the impact that the savings clause might have had on the Third Circuit's consideration of the definition of an "accident."[4] The *Wickman*

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Since the parties had stipulated that ERISA law controlled the disposition of the merits of the case, the Sixth Circuit assumed, without deciding, that ERISA applied [A-36, n. 2].

[4] While the respondent insists that the definition of the term "accident" is not determinative of this case at either the trial or appellate level, it does contend that ERISA's savings clause requires the adoption of the Tennessee decisional law definition of "accident" in ERISA accidental death, dismemberment, and disability plans because the state decisional law definition regulates the insurance industry, affects the spreading of the risk, is a term of insurance art which affects the

(Continued on following page)

opinion does not address the element considered crucial by the Sixth Circuit in this case *i.e.*, the operation and effect of express contractual exclusionary clauses in an ERISA plan.

Similarly, the appellate opinion in *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437 (9th Cir. 1990), does not conflict with the Sixth Circuit's opinion. While the Ninth Circuit opinion certainly appears to contradict the respondent's insistence that Tennessee decisional law on the definition of "accident" in accident disability policies should be "saved" from preemption under ERISA,[5] *Evans* does not address the issue of the interpretation of exclusionary clauses which was pivotal in this case. Any state decisional definition of the word "children" is neither an insurance term of art nor specifically directed at the regulation of the insurance industry.

In fact, the following language from the *Evans* opinion at 926 F.2d 1441 supports the Sixth Circuit's insistence

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relationship between the policyholder and the company, and was developed for and applied only in cases dealing expressly with accidental death and disability insurance policies. The Tennessee insurance case law "accidental means" definition is not part of any general state law applicable to other contracts or tort actions. It should therefor be preserved and applied to the policy terms in this case. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 48, n. 1 (1987).

[5] The respondent, as the prevailing party below, may defend its judgment on any ground properly raised below even though that ground was not relied upon or considered by the Magistrate of Court of appeals. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n. 20 (1979) and *Granfinanciera v. Nordberg*, 492 U.S. ___, 109 S.Ct. 2782 (1989).

that the contract exclusionary language should be given its natural meaning:

> We interpret terms in ERISA insurance policies "in an ordinary and popular sense as would a [person] of average intelligence and experience." *Allstate Insurance Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985) (applying Alaska law). We will "not artificially create ambiguity where none exists." *Id.* "If a reasonable interpretation favors the insurer and any other interpretation would be strained, no compulsion exists to torture or twist the language of the policy." *Id.*

The Sixth Circuit Court of Appeals certainly followed these precepts in determining that the factual record showed that the petitioner's active degenerative disc disease was the significant contributing cause of his present condition and thereby excluded from coverage under the terms of the plan's exclusionary clause [A-30]:

> The policy excludes loss resulting from intentionally self-inflicted injuries or suicide or any attempt thereat; accident occurring while insured is on full-time active duty in any Armed Forces; pregnancy, childbirth, *illness or disease* . . . . "

When the Sixth Circuit construed this express exclusionary clause in conjunction with the insuring clause of the policy which stated that an employee was insured "against loss resulting directly and independently of all other causes from bodily injuries caused by accident occurring while this policy is in force . . . . " [A-37], it reached the inescapable and obviously reasonable conclusion that the plaintiff's current disability, whatever that

might be, was not covered under the policy. The definition of an "accident" was not a factor in the Sixth Circuit's decision.

Nor does the decision in *Adkins v. Reliance Standard Life Insurance Co.*, 917 F.2d 794 (4th Cir. 1990), conflict with the holding below. While the accidental disability policy at issue in *Adkins* contained an insuring clause which required that the disability result "directly and independently of all other causes", there was no consideration by the court of the policy's express "illness or disease" exclusionary clause. The "unresolved ambiguity" which the Fourth Circuit found critical was the failure of the District Court to resolve the factual issues of whether the plaintiff's prior injuries and surgery contributed to his present permanent disability. Instead of fashioning a "modern" federal common law precept, the Fourth Circuit adopted a Kentucky state law rule of insurance contract construction[6] which stated:

> "[A] pre-existing infirmity or disease is not to be considered as a cause unless it substantially contributed to the disability or loss . . . . [A] "predisposition" or "susceptibility" to injury, whether it results from congenital weakness or from previous illness or injury, does not necessarily amount to a substantial contributing cause. A mere "relationship" of undetermined degree is not enough."
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> *Id.* at 797.

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[6] If there is any conflict among the circuits, it appears to be between the Fourth and Ninth Circuits as to whether state decisional law should be incorporated into ERISA's federal common law.

Neither the Magistrate nor the Sixth Circuit held that the petitioner had to be in perfect health before the October 8, 1987, lifting incident in order to be "accidentally" disabled and therefore entitled to recover the $250,000 lump sum provided by the policy for total and permanent disability. The Magistrate found, and the Sixth Circuit Court of Appeals confirmed, that the petitioner's fully documented fifteen year history of serious back pain, and significant permanent partial disability was caused by an active and progressive degenerative disc disease which pre-existed his lifting episode. The petitioner's diagnosed disc disease was found by both the Magistrate and the Sixth Circuit to be much more than a "pre-disposition" or "susceptibility" to injury.[7] There is no conflict between the Sixth and Fourth Circuits on the issue of proximate cause and the interpretation of the policy's "illness or disease" exclusionary clause.

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[7] The Magistrate's factual determinations were not challenged by the petitioner and were concurred in by the Sixth Circuit. There is no reason for this Court to review or question the factual findings regarding the significance of the plaintiff's pre-existing disease and physical limitations. *Branti v. Finkle*, 445 U.S. 507, 512, n. 6 (1980); and *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98, n. 15 (1984).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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